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## Economic Incentives in Representing Publicly-Funded Criminal Defendants in England's Crown Court

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# ECONOMIC INCENTIVES IN REPRESENTING PUBLICLY-FUNDED CRIMINAL DEFENDANTS IN ENGLAND'S CROWN COURT

Peter W. Tague\*

## INTRODUCTION

The flux now engulfing the way in which the defenders of indigent criminal defendants are compensated in England's Crown Court provides a sober lesson for U.S. lawyers. Once, U.S. lawyers, who themselves are appointed to represent indigent defendants, could have cited English practice to support a hefty increase in the meager compensation they receive in many jurisdictions.<sup>1</sup> For in balancing the tension between encouraging effective representation, but at bearable social cost, U.S. jurisdictions stress the latter, all but ignoring the former.<sup>2</sup> The English approach, by contrast, has paid generously,<sup>3</sup> at least in

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1. For a comparison of the remuneration in England's Crown Court with that in federal district court, see Peter W. Tague, *Representing Indigents in Serious Criminal Cases in England's Crown Court: The Advocates' Performance and Incentives*, 36 AM. CRIM. L. REV. 171, 220 (1999). In that article I examined, the fees paid to barristers and solicitors by legal aid in 63 cases being taxed—that is, the compensation was being chosen—in the Old Bailey, London's celebrated Crown Court for criminal cases, in 1992. The amounts paid in cases considered serious (the subject of the study), even in 1992, would make lawyers envious. For example, in a five-day trial of an uncomplicated robbery, the defendant's Queen's Counsel received £5596, his junior £2934, and his solicitor £2,946, for a total of £11,176 (or US\$16,764, at £1 = US\$1.50). A lawyer representing the same defendant in federal court would have performed the work of the two barristers and solicitor, and still received no more than US\$3500, unless that cap on the overall fee was pierced, an event that does not occur frequently. These fees, of course, far exceed the amounts barristers received in cases lasting less than three days. The compensatory schemes are described in more detail in Part I.

2. Many states pay little more than a pittance. Virginia, for example, recently increased the payment to US\$305 (from US\$265) to represent criminal defendants charged with crimes where the sentence is less than 20 years. Chief Justice Rehnquist has urged Congress to increase the compensation in federal courts, from US\$65 for time in court and US\$45 for time out of court, because "compensation rates still do not meet many attorneys' non-reimbursable overhead costs." Joan Biskupic, *Rehnquist's Year-End Report; Chief Justice Urgently Requests Higher Pay for Court-Appointed Lawyers*, WASH. POST, Jan. 1, 2000, at A2. He said nothing, however, about the US\$3500 cap. See Criminal Justice Act, 18 U.S.C. § 3006A(d)(2) (1982 & Supp.).

3. Remarkably, defending is currently compensated much more than prosecuting. As independent contractors, barristers are briefed to prosecute and to defend (a barrister can prosecute on Monday and defend on Wednesday). A study undertaken by the Crown Prosecution Service (that pays barristers' fees for prosecuting) and the Bar

serious cases, thereby implicitly recognizing that defenders could be induced by acceptable remuneration to represent indigents and to do so effectively.<sup>4</sup>

Spiraling costs in England,<sup>5</sup> however, have brought dramatic changes, and have occurred in a rush. One scheme, the so-called *ex-post facto* method,<sup>6</sup> in place for many years, was scrapped in January 1997. The replacement,<sup>7</sup> the "graduated fee scheme," crafted through negotiations between the U.K. Government and the Bar of England and Wales, was not designed to reduce then current levels of compensation,<sup>8</sup> but to enable the

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found that under the current scheme defending is paid 40% more than prosecuting, across all cases covered by set fees (from one to ten trial days).

4. There are several possible reasons why fees are so much higher, at least in serious cases. For one, the Bar has had a monopoly over the right of audience (the right to appear) in the Crown Court and appellate courts. This monopoly gave it tremendous leverage in negotiations with the Lord Chancellor's Department over the fees to be paid by legal aid. Moreover, the Lord Chancellor has always been a barrister, and thus aware of the Bar's concerns, even as he tries to control expenditures. Also, because of the so-called cab-rank rule, barristers cannot refuse a brief unless, among various reasons, the fee is inadequate. But the Bar accepts that fees paid by legal aid are sufficient—and this is so, no doubt, because the fees are generous, again at least in serious cases and when judged by U.S. standards.

5. In the Crown Court (England's court of general jurisdiction) and appellate courts the spending on criminal legal aid jumped 58% (to £349,000) over the five years ending 1997-98, even though the number of cases remained the same (124,000). See LORD CHANCELLOR'S DEPARTMENT, MODERNISING JUSTICE: THE GOVERNMENT'S PLANS FOR REFORMING LEGAL SERVICES AND THE COURTS 60, ¶ 6.6 (1998) [hereinafter REFORMING LEGAL SERVICES].

6. For an extended discussion of how this system operated, see Peter W. Tague, *Ex Post Facto Payments in Legally-Aided Criminal Cases in the Old Bailey*, 28 ANGLO-AM. L. REV. 415 (1999).

7. See The Legal Aid in Criminal and Care Proceedings (Costs) (Amendment) (No. 2) Regulations 1996, Legal Aid, S.I. 1996, No. 2655 (U.K.) [hereinafter 1996 Legal Aid Regulations].

8. One aim, however, was to redistribute the allocation of money from Queen's Counsel to junior barristers somewhat. For the difference between the two types of barristers, see *infra* note 16. A junior's basic fee now depends upon the category of offense with which the defendant is charged. With Class D sexual offenses, a junior's basic fee is £446.50, which is for preparation and the trial's first day. He also received two fees for each trial day after the first, a refresher—the standard term for the fee for each succeeding trial day—and an uplift for each day. Under the former scheme, non-*ex post facto* (or standard fee) cases were also paid a set amount, but it was the same no matter the nature of the case. In 1995, the basic fee for a trial was £214, and £153 for each trial day after the first. See The Legal Aid in Criminal Care and Proceedings (Costs) Regulations 1989, Legal Aid, S.I. 1989, No. 343, Sched. 2 (U.K.). It is true, however, that many rape defenses would have been regarded as special cases under the old scheme, with a higher fee determined after the fact. The fees paid under the graduated fee scheme are ostensibly not overly generous when compared to those in federal courts. For example, the junior's basic fee in that Class D case, expressed as an hourly

Lord Chancellor to control future increases in cost.

Yet this reform has apparently not proven sufficient. In the White Paper, published in December 1998, the Lord Chancellor, without elaboration, bemoaned "inappropriate" financial incentives that resulted in unnecessary adjournments and delayed guilty pleas.<sup>9</sup> Rather than changing the graduated fee scheme to re-channel those incentives, however, the Lord Chancellor is proposing various innovations whose effect will be to limit the defendant's right to select the solicitor and barrister,<sup>10</sup> and to destroy the hoary tradition of having barristers, as independent contractors, represent both the prosecution and defendant in the Crown Court.<sup>11</sup> These changes include redistributing de-

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rate, is £56 or US\$84 (£1 = US\$1.50) (£446/8, assuming three hours to prepare plus five hours for the trial's first day). Under the old scheme, the hourly rate would sink to £27 (£214/8) or US\$41. But under the current scheme, the barrister is paid twice for each succeeding trial day: a refresher of £145.50 and an uplift of £282. Hence, assuming a two-day trial, the barrister would receive £1017.70 (£446.50 + £145.50 + £282) or US\$1518. In addition he would be paid £1.08 per page of prosecution evidence and £7.14 per prosecution witness. Assuming the lawyer was compensated for the same time—three hours to prepare plus five hours per trial day—his compensation, at US\$75 per hour, would be US\$975 (13 x US\$75). Of course, the lawyer would take much more time to prepare; but his extra preparation would be paid to the defendant's solicitor who undertook this work. Since the Crown Prosecution Service has not adopted the graduated fee scheme, the barristers it briefs to prosecute in Crown Court, in non-*ex post facto* cases, are paid less: £224 for a basic fee and £155 for each refresher. CROWN PROSECUTION SERVICE, PROSECUTION COUNSEL FEES IN THE CROWN COURT ¶ 6 (1995). I was told these fees have not changed.

9. See REFORMING LEGAL SERVICES, *supra* note 5, at 60-61, ¶ 6.7 (noting also that cases are unnecessarily taken to Crown Court rather than adjudicated in magistrates' court). The fees paid to barristers are much higher when the defendant pleads guilty shortly before or as the trial begins (called a "cracked" trial) than if he does so at an earlier stage. Thus, barristers have an incentive to delay negotiating a guilty plea until the trial.

10. The Government presaged inroads into the defendant's ability to select the barrister in the White Paper. It defended the "inevitabl[e] . . . restriction on the unfettered choice of lawyer the clients have under the current legal aid system" by asserting that it was "necessary and desirable in order to secure quality and value for money." REFORMING LEGAL SERVICES, *supra* note 5, at 63, ¶ 6.20. In truth, limits appear directed more to solicitors than barristers. The Government intends to develop contracts with solicitors' firms to provide the gamut of legal services in criminal cases. The purposes are to control costs and to ensure quality (through monitoring of performance.) Defendants will be able to choose any solicitor from among those with a contract. See LORD CHANCELLOR'S DEPARTMENT, MODERNISING JUSTICE 10-11 (1998).

11. The Bar is alarmed about these possible changes but, in truth, its worry is probably exaggerated. From their publications and through my conversations with the Lord Chancellor's Department and the Legal Aid Board, the Government intends to institute a scheme of contracts for solicitors to undertake Crown Court (as well as Magistrates' court) work by 2003. See CRIMINAL DEFENCE SERVICES, LEGAL AID FRANCHISE, INTRODUC-

fense work by contract based on a fixed fee,<sup>12</sup> creating a public defender system, and extending the right of audience (the right to appear) in Crown Court to lawyers in the Crown Prosecution Service.<sup>13</sup>

The recently revealed hefty fees paid to a few Queen's Counsel has further fueled the Government's intent to reduce expenditures in criminal—and family—legal aid.<sup>14</sup> The Govern-

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ING CONTRACTS FOR CRIMINAL DEFENCE SERVICES WITH LAWYERS IN PRIVATE PRACTICE (1999). Because solicitors can now qualify as advocates in Crown Court, it is possible that some of these solicitors' firms will not retain a barrister to advocate in Crown Court, but will do the advocacy themselves. With solicitors able to advocate in Crown Court, the most efficient approach for the Government would be to pay the solicitor a set amount to represent the indigent defendant, and let him decide whether to hire a barrister or perform the advocacy by himself. If the former, then the solicitor would negotiate a fee with the barrister, and pay him from the bulk amount received from legal aid. Barristers worry about such an arrangement: their fees would probably drop because solicitors could threaten to do the work themselves; solicitors might tarry in paying the barrister's fee, creating the cash-flow problems that plague many barristers in privately-funded cases. But the Government recognizes these problems, and appears intent on paying directly any barrister who is briefed by the solicitor. A pilot project creating several small public defender offices may begin soon, too. But even if these offices succeed, the Government has no plan for public defenders to become the chief supplier of defense advocacy, as in many jurisdictions in the United States. Instead, public defenders will compete with solicitors and barristers to provide advocacy. That is, so long as defendants remain able to choose the advocate, he or she could select either the public defender or a solicitor, and, if a solicitor, a barrister to advocate (unless the defendant was satisfied to have the solicitor provide the advocacy). If public defenders flourish, then they will grow no larger than providing 50% of the work in legal aid cases, enough, of course, to draw considerable business from barristers and solicitors.

12. Sobering descriptions of how lawyers fulfill their obligations under a contract have not discouraged the Lord Chancellor from this legislative resolve. See Larry S. Pozner, *Life, Liberty and Low-Bid Lawyers: The Defiling of Gideon*, CHAMPION, July 1999, at 9.

13. The Bar has fought this last innovation, now scheduled for implementation in April 2000, on two grounds. The formal ground is that barristers must be independent contractors, willing to represent either the prosecution or defense. Barristers or solicitors in the Crown Prosecution Service (in effect, a nation-wide prosecutorial office whose lawyers heretofore acted as solicitors, preparing the prosecution's case to be delivered to a barrister to present in court) are salaried employees, and thus not independent contractors. The substantive reason was the claim that the person with ultimate authority to dismiss the case, negotiate a guilty plea, or try the accusation ought to be independent on the Government. The barrister is such a person; an employee of the Government (the Crown Prosecution Service) is not.

14. The fees for the 20 barristers who received the most from legal aid in financial year 1996-97 ranged from a low of £329,000-349,000 (for three barristers) to a high of over £500,000 (for two barristers). Lord Chancellor's Department, Parliamentary Question—Answer (drafted on Apr. 28, 1998). The figures are potentially misleading in that part of the amounts could have been for work performed in preceding years because the Lord Chancellor's Department keeps data on payments only for completed cases.

ment now threatens to slash fees,<sup>15</sup> and to bar Queen's Counsel,<sup>16</sup> who make the most money and are assumed to provide the most able representation, from appearing in other than the most serious cases.<sup>17</sup> Were Queen's Counsel to appear less frequently, overall expenditures would likely be slashed,<sup>18</sup> and fees paid to juniors would not be as wildly out of balance as is the comparison between fees to lawyers and to Queen's Counsel.<sup>19</sup>

Seemingly ignored by the Government in implementing these changes in compensation is the way that such shifts can alter the advocate's incentives to appear and to perform effectively.<sup>20</sup> Here, the U.S. experience is instructive. Indigent de-

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Nonetheless, the amounts are staggering, when compared to the remuneration in the United States. For an analysis of the lucrative fees paid under the *ex-post facto* scheme when compared with those in federal court, see Tague, *supra* note 6. Assume that a lawyer worked exclusively in a federal district paying the top hourly fee (US\$75). For 50, 47-hour weeks, such a lawyer would earn US\$175,000 (US\$3500 [the cap on any case]/75 = 47 hours per week; US\$3500 x 50 = US\$175,000).

15. See Frances Gibb, *Barristers Pay Is Cut by £50m in Assault on Legal Aid*, TIMES (LONDON), Dec. 7, 1999, at 1 (proposing reduction in defense fees, now said to be £550 for two-day trial, to £375, amount received when prosecuting). The Bar would prefer to rectify the imbalance between the fees paid to prosecute and to defend by raising the former to the level of the latter. On the other hand, parity, together with a reduction in expenditures, could as easily be achieved by lowering the fees to defend to the level of fees to prosecute. But this would violate the Lord Chancellor's promise, when instituting the graduated fee scheme, not to reduce the overall fees then paid to defenders.

16. Barristers are classified as Queen's Counsel or as juniors. The former, about 10% of all barristers, are chosen by the Monarch, on the advice of the Lord Chancellor, supposedly on the basis of demonstrated skill as an advocate, after a minimum of 10 years of practice. All other barristers, no matter their age or experience, are known as juniors. A junior's elevation to the status of Queen's Counsel brings prestige and higher fees, even from legal aid. For a discussion, see PETER W. TAGUE, *EFFECTIVE ADVOCACY FOR THE CRIMINAL DEFENDANT: THE BARRISTER VS. THE LAWYER* 20-21 (1996).

17. The Lord Chancellor's parliamentary secretary has said that only in "truly exceptional cases"—when the Crown's evidence consisted of at least 1000 pages or 80 witnesses—would the need exist for the defendant to be represented by a Queen's Counsel. *Lock Leads the Clampdown on Legal Aid QCs*, SOLIC. J., Dec. 3, 1999, at 1131. If that change were implemented, then it truly would be exceptional, because Queen's Counsel now appear in cases that often appear routine to a lawyer. See part II(A), *infra*; Tague, *supra* note 1.

18. It is estimated that 40% of legal aid expenditure for criminal defense is consumed by one percent of the caseload. See CRIMINAL DEFENCE SERVICES, *ENSURING QUALITY AND CONTROLLING COST IN VERY HIGH COST CRIMINAL CASES* ¶ 2.0 (1999). If in a sizeable number of those cases juniors would appear rather than Queen's Counsel, then the level of expenditure would obviously drop.

19. See Tague, *supra* note 1 (providing illustration of fees received by Queen's Counsel); see also Criminal Care and Proceedings, *supra* note 7 (describing juniors' fees).

20. The White Paper belies this point, but the Lord Chancellor neither explained

fendants do not select the lawyer;<sup>21</sup> judges or court personnel make these decisions instead. Even if the defendant had the power his counterpart in the United Kingdom now does to choose the lawyer, many lawyers would refuse the appointment. Not bound by the cab-rank rule to represent any client who seeks help, many able lawyers do not take appointments, discouraged by the very low fees. Those lawyers who do accept appointments are not encouraged by incentives to perform appropriately. They are chosen whether they lack acuity or zealously. They are not rewarded for a stellar or efficient performance or punished for a lackluster one. Nor do they need to respond to the defendant's desires because of the defendant's difficulty in replacing the appointed lawyer. Lawyers thus do not need to develop a reputation for zealous, compassionate representation in order to attract and to keep work.

Barristers are chosen and policed in very different ways from lawyers. These differences may explain why the Lord Chancellor appears to have ignored the dampening effect on incentives. The Government may be confident that these other considerations will continue to encourage barristers to represent indigents, and to perform appropriately. For one thing, barristers who specialize in crime would face the difficulty of retooling to compete with other barristers in another field of advocacy. For another, the cab-rank rule, requiring an available barrister to accept a brief to represent a defendant, will force barristers to continue to represent indigent defendants who seek help.<sup>22</sup>

A third difference is the most important. Barristers do not work if they perform badly. Unlike lawyers who are appointed

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how financial incentives "inappropriate[ly]" led to delay in guilty pleas nor proposed a solution. See REFORMING LEGAL SERVICES, *supra* note 5, at 60-61, ¶ 6.7. This is an issue discussed below. See part II(B) *infra*. It is safe to say the Lord Chancellor has not published anything discussing how incentives are affected by changes in the remuneration scheme.

21. For an argument that they should have this power, see Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).

22. While barristers can refuse work if the compensation is inadequate, the Bar accepts that legal aid payments are sufficient. They have been, at least when compared to remuneration in U.S. jurisdictions. There appears to be no study exploring how much more barristers make in representing defendants who can pay. But with 94% of criminal defendants in Crown Court making no contribution to the cost of their representation, see REFORMING LEGAL SERVICES, *supra* note 5, at 61, ¶ 6.8, and undoubtedly others receiving legal aid as well, there are not many defendants with the money to hire a solicitor and barrister. Barristers who defend depend on legal aid for their incomes.

by the court, barristers are selected by the solicitor who is the actual representative of the criminal defendant. Thus, even in legal aid cases the defendant, through the solicitor, chooses the barrister, unlike in the United States, where the indigent defendant has a lawyer chosen for (or imposed upon) him. Barristers are not briefed unless the solicitor expects them to perform appropriately. The barrister who receives a brief risks being fired for not performing as expected, because the indigent defendant can replace the barrister relatively easily. Should he displease the solicitor (or the defendant), the barrister risks even more than the loss of the particular brief; he may lose the solicitor's business in future cases.

Thus, there are structural reasons that could assuage the worry that changes in the compensatory scheme will undermine effective, efficient representation by barristers. Nonetheless, one could expect that changes in compensation will lead a certain number of barristers to find an excuse not to accept an indigent's brief, or to shirk when representing an indigent. Identifying various areas in which representation could change is the topic of this Essay. That purpose is illustrated by comparing the incentives under the *ex-post facto* and graduated fee schemes.

A secondary purpose of this Essay is to illustrate some of the marked differences in practice between barristers and lawyers. To presage one example, barristers were once rewarded for shortening the proceedings, an inducement that could have created a conflict between the barrister and defendant, with the former refusing to call or to cross-examine a witness, or to advance a position that the defendant favored. Lawyers, by contrast, often attack broadly, never relinquishing any point that holds the possibility of undermining the prosecution's case.

## I. TWO COMPENSATORY SCHEMES

How are barristers compensated under the graduated fee scheme and how were they under the prior, *ex-post facto* system? Barristers are paid a basic fee for preparing the brief<sup>23</sup> and for

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23. The brief is the set of papers collected and prepared by the solicitor. It includes the charging documents, the Crown's disclosure of materials, statements from the defendant and possibly his witnesses, and the defendant's instructions to the barrister concerning the issues to raise and the facts to present, together with the defendant's indication of a desire to fight or to plead guilty.



the trial's first day (if the defendant has not pleaded guilty), and a separate fee ("refresher") for each additional trial day. They are also paid for particular conduct like conferring with the solicitor and defendant before or during the trial,<sup>24</sup> visiting the crime scene, and listening to a tape-recording of the defendant's interview with the police.<sup>25</sup>

Basic fees under the graduated fee scheme are set in advance, as they were in the bulk of cases under the discarded scheme. Creating the new scheme must have been difficult, but administering it is simple.<sup>26</sup> All offenses are now assigned to one of nine classes, and for the charged offense a basic fee is set in light of the way the case was resolved (by plea or by trial, as explained below).<sup>27</sup> In most cases under the old scheme—those where junior barristers represented the defendant—the basic fee was also set in advance. In 1996, junior barristers received a basic fee of £221.50 if the case was tried, no matter how long they toiled in preparing and a set refresher of £158.25.<sup>28</sup> That fixed fee did not itself create an incentive for the junior to perform skillfully or to retain the brief. When tested only by the compensatory scheme, juniors were indifferent as to the brief they took.<sup>29</sup>

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24. The time taken to prepare for a pretrial conference, however, is not compensated separately, but considered part of the basic fee; similarly, short conferences during the trial are part of the refresher, although conferences that last a longer (but unspecified) time deserve special compensation.

25. The amounts for these specific acts are calculated by the hour, for Queen's Counsel and for juniors. The amounts are £62.50 for a Queen's Counsel and £33.50 for a junior. See 1996 Legal Aid Regulations, *supra* note 7, sched. C, ¶ 21.

26. The difficulty involved comparing offenses, assigning each to a class, and then calculating the different amounts to pay as a basic fee for each class of offense. It was not the Lord Chancellor's purpose to lower the payments barristers had received under the old scheme, but to establish a way to control costs in the future. Thus, the graduated fee scheme, whose development was fashioned with close participation by the Bar, should not drive barristers from representing legally-aided criminal defendants because the compensation will worsen. Administration should be simple in that the fee can be calculated easily.

27. The basic fee also varies depending upon the number of witnesses the Crown calls and quantity of paper it discloses to the defense as part of discovery.

28. See 1996 Legal Aid Regulations, *supra* note 7, pt. I, sched. 2 (tbl.).

29. This indifference led to the return of many briefs. An appalling feature of English practice, one that undermines the value of the cab-rank rule, is the number of briefs that are returned, fully 50% in defense cases. See General Council of the Bar, Study of Remuneration of Barristers Carrying Out Criminal Legal Aid, Annex B, tbl. B5, at B7. On the other hand, other motivations, like pleasing the solicitor or the clerk of the barrister's chambers (who distributes work among the juniors), or the challenge of

The major difference between the two schemes lies in calculating barristers' fees in the more serious cases. Under the graduated fee scheme the amount is, as noted, established in advance, with higher payments for different classes reflecting the severity of the offense.<sup>30</sup> Under the old scheme, by contrast, cases were divided into standard and non-standard (more properly, "*ex-post facto*") cases. Junior barristers appeared in cases warranting a standard award, and were paid a set fee as noted above. With *ex-post facto* cases, however, after the matter had ended, the basic fee and any refresher were decided by a member of the Lord Chancellor's Department. Called a determining officer, this person reviewed the defense's file, a claim form completed by the barrister indicating the time taken to prepare the brief and the monetary amount sought, and any memorandum the barrister chose to submit explaining the difficulties encountered in representing the defendant.<sup>31</sup>

Barristers were eligible for *ex-post facto* fees in only three instances: the crime charged was very serious;<sup>32</sup> the trial, no matter what the offense, ran for more than three days (or would have, if the defendant had not pleaded guilty); or a "standard fee [was] inappropriate taking into account all the relevant circumstances of the case . . . ." <sup>33</sup> Queen's Counsel automatically

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intricate legal or factual issues, might have goaded juniors to prepare, to keep the brief, and to advocate effectively. Moreover, juniors could receive higher, *ex post facto* compensation if "owing to the exceptional circumstances of the case" the standard fees "would not provide reasonable remuneration . . . ." The Legal Aid in Criminal Care and Proceedings (Costs) Regulations 1989, Legal Aid, S.I. 1989, No. 343, reg. 9(5)(b) (U.K.). If a junior thought he could persuade a Taxing Officer to make such a determination after the case ended, then he would have an incentive to keep the brief. Taxing officers are quasi-judicial officers who consider appeals from awards made by determining officers. Such appeals were often granted, I was told by a Taxing Master, although there is apparently no record of the numbers to confirm the point.

30. Under the graduated fee scheme, fees for trials lasting longer than 10 days are also calculated *ex post facto*. Because such a process can be arbitrary and also lead to the award of higher fees, the Lord Chancellor intends to extend the scheme to trials lasting as long as 25 days, and to negotiate individual contracts for trials expected to last even longer.

31. This information, together with much else (the official papers, the solicitor's brief, the witnesses' statements, for example), I reviewed in the cases referred to in this Essay. See Tague, *supra* note 1, at 173-74 (describing material in files).

32. The crime had to be categorized as a class 1 or class 2 offense (like murder or manslaughter). See ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE (Tables & Index) 709, ¶ G-7 (P.J. Richardson ed. 1996).

33. The Legal Aid in Criminal Care and Proceedings (Costs) Regulations 1989, Legal Aid, S.I. 1989, No. 343, reg. 9(2) (U.K.).

qualified to receive *ex-post facto* fees because they cannot appear for a legally-aided defendant unless the offense is murder or the case is so "exceptional[ly] difficult[ ], grave[ ] or complex[ ] . . . that the interests of justice . . . require the services of two counsel."<sup>34</sup>

The determining officer's responsibility demanded a herculean calculation of various considerations.<sup>35</sup> She was expected to decide if the advocate should have performed the work he said he undertook, and then whether he had acted efficiently. Having answered those questions, she was to choose an amount for the basic fee and refreshers that matched the "weight, seriousness, importance and complexity of the case . . . ."<sup>36</sup>

In the cases in my study, determining officers commonly found that barristers acted inefficiently, as federal judges occasionally do with lawyers,<sup>37</sup> and accordingly paid only a portion of the amounts sought by the advocates.<sup>38</sup> Unlike lawyers, however, barristers were also rewarded for reducing the time needed to adjudicate the controversy and for acting efficiently in preparing to advocate.

As remains so under the graduated fee scheme, the basic fee in *ex-post facto* cases was a function of the stage at which the matter was resolved. The barrister's basic fee was the lowest

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34. The Legal Aid in Criminal and Care Proceedings (General) Regulations 1989, Legal Aid, S.I. 1989, No. 344, reg. 48(2)(b) (U.K.). Queen's Counsel can now appear by themselves, without the assistance of a junior, but experience indicates that few do. Indeed, the cases in my study suggest that this test is not interpreted narrowly, so that defendants often received the help of a Queen's Counsel (and a junior and solicitor, of course) in not very difficult defenses. For an example, see the text *infra* accompanying note 50. The Lord Chancellor seems determined to restrict further when Queen's Counsel can appear. See *Clampdown on Legal Aid*, *supra* note 17.

35. The Lord Chancellor's suspicion that determining officers' awards were not always justifiable was an important ingredient in the decision to scuttle the old scheme. Another factor was the difficulty in controlling the ever-increasing budget in *ex-post facto* cases, and the hope that with set fees for each category of offense future costs will be more predictable. It is not the case, though, that *ex-post facto* fees have been eliminated under the graduated fee scheme, but that process is reserved for very long and unusual cases.

36. LORD CHANCELLOR'S DEPARTMENT, TAXING OFFICERS—NOTES FOR GUIDANCE 8, ¶ 20 (1979).

37. See *United States v. Carnevale*, 624 F. Supp. 381 (D.R.I. 1985) (stating that defense lawyer paid less than hourly rate established by statute because of uninspired performance).

38. See Tague, *supra* note 6. The largest reduction was suffered by a Queen's Counsel who received less than half (£3000) of the amount (£6250) he sought, based on 22 hours of preparation.

when the defendant announced the intent to plead guilty before the day of trial. Except for mitigating a defendant's sentencing, this indication frees the defending barrister to shift his attention to other briefs. The basic fee climbed much higher when the case was tried, but reached its acme when the trial "cracked."<sup>39</sup> That phenomenon occurred when the defendant, having signaled a desire to fight, instead caved and elected to plead guilty on the day of trial.<sup>40</sup> The reason why a cracked trial commands the highest effective hourly rate is unclear. One explanation, offered by a person experienced in taxation, is that the higher fee recognizes that the barrister prepared for trial but ultimately convinced the defendant to plead guilty. But this is not persuasive because the preparation undertaken should be the same since the barrister does not know whether the defendant will ultimately plead guilty or fight at trial. Moreover, the barrister whose client fights effectively is penalized because the basic fee includes the trial's first five-hour day and any short conferences on that day. One would thus expect the barrister who goes to trial to deserve the highest basic fee, both in gross and as calculated by time spent in preparation and performance. On the other hand, because the defendant's decision to plead guilty supposedly surprised the barrister, he would have no other brief as a substitute,<sup>41</sup> and perhaps should therefore be compensated as if the case had been tried.<sup>42</sup>

Barristers were also rewarded for shortening a trial by, for

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39. The basic fee might have been higher in gross when the case was tried, but lower when calculated in terms of the hours the barrister took to prepare (what might be called the "effective hourly rate") because the basic fee for a case tried includes the five hours of the trial's first day. While barristers have resisted payment by time expended, because such a system could reward the slothful and penalize the swift, it is the only currency that can be used to compare compensation received in different cases.

40. The federal compensatory scheme, of course, contains none of these distinctions. The lawyer totals his hours, and they are multiplied by the relevant hourly rate.

41. Of course, the barrister's clerk might find another brief for him, although such an occurrence would be extremely rare for a Queen's Counsel. This point illustrates another difference between lawyers' and barristers' work. Barristers typically work on few cases simultaneously, often one at a time. There is little incentive to prepare a brief that has no fixed date for trial because briefs are returned so frequently. Only very serious cases, typically involving a leader, received fixed dates. Moreover, barristers cannot schedule the appearance of a number of defendants to plead guilty, as lawyers do, to minimize the advocate's time in court.

42. One might describe the result as including within the basic fee for a cracked trial part of the refreshers the barrister would have received if the case had instead been tried.

example, stipulating to the admission of evidence or electing not to call witnesses or introduce evidence.<sup>43</sup> They received a higher effective hourly rate if they needed less time to prepare than a hypothetical benchmark established by determining officers in certain sorts of cases.<sup>44</sup>

Whether by design or not, the graduated fee scheme eliminates several of the old scheme's incentives to perform efficiently. For the Lord Chancellor, the most important reason to adopt the new scheme was to corral future costs. The Bar's aims, in its negotiation with the Lord Chancellor, were to avoid a reduction in the current levels of compensation, to escape the vagaries of the decisions by determining officers and to accelerate the receipt of payment. Both protagonists appeared to ignore whether the payment scheme might advance or retard effective advocacy. With this introduction, the discussion turns to specific incentives for the advocate to act efficiently and effectively that existed in the old scheme, and to learn their fate under the graduated fee approach.

## II. INCENTIVES TO REDUCE THE COST OF RESOLVING THE CASE

The resources needed to adjudicate a prosecution could be

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43. A lawyer's economic incentive, by contrast, is to extend or shorten the trial depending on the number of hours needed to reach the compensatory ceiling.

44. A determining officer told me that barristers were expected to need around 20 hours to prepare to defend a murder charge. A barrister who took less time to prepare would receive a higher effective hourly rate; one who took more time would receive a lower effective rate, unless he justified the deviation. Determining officers never publicized this benchmark, and its use could lead to peculiar results. It did not assume, for example, that barristers were effectively fungible, so that other barristers would also have needed, say, no more than 10 hours or as many as 30 hours taken by the barrister seeking compensation. Also, using a benchmark ignores the contributions of the instructing solicitor and junior. The time needed by a leader ought to be a function of the thoroughness of the brief and of the junior's preparation of it. It seems peculiar that a leader would benefit financially if the solicitor's brief was so thorough that he needed less time to prepare than usual, or suffer if his junior's efforts proved so ineffectual that he had to assume work that a junior would otherwise be expected to perform. For an example, see Tague, *supra* note 6, at 436-38. An experienced commentator decried using a "suggested bench mark" as "highly dangerous and although it may be that Determining Officers do work by rule of thumb the fact is that the Determining Officer should consider what work needed to be done and what was a reasonable time for doing it." Yet, without a benchmark, a determining officer has no compass to gauge any fee, or to ensure that her awards are more or less uniform with those of her colleagues.

influenced by the work of the junior barrister, and reduced by eliminating or shortening the trial.

### A. *The Work of Junior Barristers*

The cost of the defense soars when a leader joins a junior in representing the defendant.<sup>45</sup> The junior commonly receives half the Queen's Counsel's typically handsome payment. One obvious way of reducing costs, then, is to ensure that juniors do not inappropriately ask to be led. If, however, the junior lacks the needed skill or believes that the defendant, because of his peril, deserves to be represented by a leader, then the junior should advise the solicitor to seek a leader. But the junior also has an incentive to exaggerate the difficulties posed by the representation.<sup>46</sup> Once led, he can expect a large payment without regard to his contribution to the defense.<sup>47</sup> Indeed, he has an incentive to shirk by transferring to the leader the burden of preparation.<sup>48</sup> When the leader worked more, and the junior less, than expected, the leader might receive a high gross payment, an amount that translated into a low effective hourly rate for the leader but a high rate for the junior.<sup>49</sup> In turn, the solicitor has no incentive to reject the junior's suggestion to request a

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45. This explains why the Lord Chancellor is interested in limiting the instances when Queen's Counsel, the highest paid advocate, can appear. See TAGUE, *supra* note 16.

46. Of course, a judge might recognize the exaggeration and embarrass the junior by refusing the application. But if an application is made, the judge might grant it to spare the junior a different source of embarrassment, to appear alone when he is inexperienced. There seems to be no record of the applications to learn how many are refused and why.

47. In defending the time they took to prepare in their submissions in the cases in the study, no Queen's Counsel complained about the junior's efforts to the determining officer. Even so, several leaders labored longer than did the junior in preparing, thereby violating the Lord Chancellor's model of discouraging those with more experience (and presumably greater skill) from undertaking work that less experienced (and thus less expensive) legal actors could adequately perform. See LORD CHANCELLOR'S DEPARTMENT, *supra* note 36, at 35, ¶ 107. Not surprisingly, these leaders received among the lowest effective hourly rates. The lesson was that they should have demanded more work from their juniors.

48. Here too, practice may douse this incentive. A conscientious junior would continue to work, to help the defendant, and to smooth the leader's assumption of control. And leaders may demand much from the junior (and solicitor), in effect capitalizing on their efforts.

49. Consider two cases in the study in which the junior took 12 hours to prepare and his leader much longer. For 21 hours of preparation, one Queen's Counsel received a basic fee of £3000 (or £115 as an effective hourly rate); his junior, £1500 (or

leader. The solicitor can please the defendant and enhance his reputation by persuading him that through the solicitor's (and the junior's) efforts, the defense has been strengthened by the addition of the leader.

The *ex-post facto* scheme included two incentives to dissuade juniors from asking to be led or from shirking if led. By representing the defendant by themselves they could be paid more than if led. And, if led, they could be paid more than half the leader's remuneration by making a special contribution to the defense. There was no evidence in the cases studied that this first incentive caused any juniors to forego asking to be led. Indeed, there were several instances when the junior's justification for being led was unconvincing. In a prosecution for raping two teenage girls, for example, the junior's request for a leader was surprising in that the only difficulty he posited was the need to compare the victims' testimony at an old-style committal hearing with each victim's statement to the police,<sup>50</sup> a total of thirty-four pages. By seeking help, this presumably experienced junior indicted not only his own prowess,<sup>51</sup> but also that of the solicitor for choosing a diffident or slothful junior advocate.<sup>52</sup>

The ineffectiveness of this first incentive could be explained by a junior's difficulty in predicting the fee if he were led or acted alone. Juniors probably expected to receive a higher amount by tying their remuneration to a leader's than by representing the defendant by themselves. Two other reasons countered their interest in acting alone. When led, their responsibility drops and they gain the opportunity of learning from a leader.<sup>53</sup>

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£88 per hour). The basic fee for the Queen's Counsel in the other case, for 37 hours of preparation, was £3750 (£91 per hour). His junior received £1875 (£110).

50. An old-style committal hearing was the equivalent of a contested preliminary examination in the United States. It has now been abolished.

51. Called to the Bar in 1975, this junior would have been practicing for 17 years.

52. Although the force of this criticism is blunted by the fact that the request was approved, it is perhaps understandable why judges might not reject such requests. Rejection would embarrass both the junior and the solicitor for failing in their responsibilities. No one has apparently studied how often and why judges approve requests for a leader in non-homicide prosecutions. One observer thought that judges frequently rejected requests for a leader, but was not asked to comment on the instances I found where the grant of the request was surprising.

53. Offsetting these reasons to be led is the junior's interest in gaining experience in serious cases, in hope of garnering more important briefs and, eventually, of being promoted to Queen's Counsel.

There was some evidence of the second incentive—inducing the junior to make a stellar effort—at work. In two cases, juniors received more than half the Queen's Counsel's basic fee. One was rewarded when forced to represent the defendant by himself until near the trial because of the difficulty in retaining a leader. The other was because his leader was reluctant both to speak with the defendant or to prepare, thus forcing the junior to assume more responsibility than normal.

A third case illustrated another value of this second incentive. A defendant, charged with murder and thus entitled to two barristers, instead was satisfied to be represented by a single junior because he was impressed by the junior's efforts during the defendant's old-style committal hearing. Near the trial this junior asked to be led, without explaining the reason. It appears he received more than half the leader's payment. Had he not, the prospect of receiving no more than half the leader's fee might cause such a junior to hesitate to ask for a leader near the trial. He would know that his extensive efforts would reduce the time needed by the leader to prepare, thus probably causing the leader to receive a relatively low gross fee. Half of that low fee might be less, even considerably less, than what the junior would receive by continuing to act alone. Yet, if a leader were needed—the junior suddenly felt overwhelmed by the quantity of evidence, for example, or unsure whether he could counter a new expert the Crown indicated it would use—the junior might be reluctant to call for help without this second incentive, and the defendant could suffer.

The graduated fee scheme virtually eliminated the first of these two incentives, and did delete the second. The first currently applies only in multi-defendant prosecutions, and then only when the co-defendant is represented by a leader and junior and the junior's defendant is charged with an offense that falls within the same class as one of the offenses charged against the co-defendant.<sup>54</sup> In this narrow instance the junior has no monetary incentive to ask to be led because he will be paid as if he were being led. With the financial factor eliminated, such a junior balances the extra work involved and the fear of failure in acting alone, when deciding whether to request a leader, against the defendant's needs and the opportunity to learn if led.

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54. See 1996 Legal Aid Regulations, *supra* note 7, sched. 3, ¶ 23(2).



Whenever the prosecution involves a single defendant, however, juniors might clamor to be led whenever the crime falls into any category other than the most serious. Only with "homicide and related grave offenses," as Class A crimes are described, does the junior receive half the Queen's Counsel's fees. With every other offense, the junior's compensation, when representing the defendant by himself, is significantly less than half that received by a Queen's Counsel.<sup>55</sup> Yet, while thus encouraged to ask to be led, juniors receive no more, but also never less, than half the Queen's Counsel's award. Thus, the junior is neither rewarded for a stellar performance, nor punished for shirking. Hence, when viewed only from the perspective of compensation, juniors have an incentive to increase the cost of the defense by asking to be led and, once led, have an incentive to shirk.

There are ways to counter the failure to include these incentives in the graduated fee scheme. A junior's request for a leader could be scrutinized much more skeptically by the judiciary,<sup>56</sup> and denied when the junior appears sufficiently skilled or the solicitor has time to retain a more confident junior.<sup>57</sup> Leaders have reason to police the junior to prevent shirking. Because the leader's basic fee under the new scheme has lost its relationship to the hours taken to prepare, he maximizes his effective hourly return by doing less himself, achieved by driving the junior to undertake more preparation than usual. Moreover, the junior could be punished if the leader complained to the solicitor about the junior's effort, or the solicitor himself concluded that the junior was not behaving as expected. Either event could

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55. For example, with a Class D offense (serious sexual offenses), a Queen's Counsel's basic fee is £1550.50, that of all other advocates, £446.50 (29% of the Queen's Counsel's, and only 57% of that received if led). For each refresher, the Queen's Counsel receives £413.50, all others £145.50 (32% of the Queen's Counsel's, and 63% of that received if led). The uplift for each trial day, however, is almost 50% (£574.50 vs. £282), and the uplift for each page of the Crown's evidence is almost 40% (£2.75 vs. £1.08), as is the uplift for each Crown witness (£18.13 vs. £7.14).

56. No study has been done of the judicial process of appointing leaders (a Queen's Counsel or experienced junior), but anecdotal evidence suggests that the judiciary routinely appoints Queen's Counsel in cases that a lawyer with a modicum of experience would be expected to undertake in a public defender's office in the United States.

57. A variation of this approach may be adopted by the Lord Chancellor. The instances when Queen's Counsel can appear will simply be reduced. See TAGUE, *supra* note 16. This attempt, however, may fail if any discretion remains to appoint a leader in a case that seems modestly difficult, as the junior seeks help.

cause the junior's ouster from the particular case or cost the junior a source of briefs in the future.

### B. Shortening the Prosecution

Two other ways to reduce expenditures are to resolve prosecutions by a guilty plea or to shorten trials. In *ex-post facto* cases, defending barristers were paid a higher basic fee, when calculated as an effective hourly rate, when the trial was abbreviated through their effort, and the highest fee when the case cracked. The new scheme scraps the first incentive but continues the second.

Barristers clearly were aware of these incentives, as my study revealed, mentioning the relevant reason in the memorandum submitted to persuade the determining officer to award the amount sought. The highest effective hourly rate (£535, equal to US\$803) was received by a Queen's Counsel whose defendant's guilty plea, entered as the trial was to begin, eliminated the need for a five-day trial. The next highest effective hourly rate (£300) was received by a different Queen's Counsel when, according to the judge's comment, the case, anticipated to last over a week, was ended by guilty plea through the barrister's efforts, again on the trial's first day. On the other hand, of those cases resolved by trial, it is less clear that the two Queen's Counsel were rewarded who, in separate cases, each claimed his admissions or agreements with the Crown had shortened the proceeding (by three days in one case and by four in the other). One received an effective hourly rate of £149 and the other, £129.<sup>58</sup>

Yet, rewarding the barrister in each instance could be problematic in two ways: there lurks the potential for a conflict between the advocate's and the defendant's interests; the cracked

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58. The former's rate was the second highest of all awards in cases resolved by trial. The highest was £200. But of those Queen's Counsel who did not profess to shorten the trial, two received a rate of £140 and two others in the low £120s. The others received much less, with the lowest a paltry £91.50. While the effective hourly rates of these two who shortened the trial are princely when compared with the hourly rates received by lawyers, one might have expected a higher figure in light of the policy of encouraging a speedy resolution of cases. Perhaps determining officers were reluctant to reward these leaders because of the difficulty in establishing the causal link between the trial's length and the barrister's efforts. Or perhaps they thought the barristers were responding only to pressure from the trial judge to forego challenging non-controversial evidence or demanding specific proof of some point from the Crown.

trial creates its own expenses. One case in the study suggested the first problem—the lamentable possibility that the barrister might bully a defendant who wanted a trial to plead guilty.<sup>59</sup> The defendant was charged in connection with the importation of a large cache of drugs. As part of the plea agreement, he would inform on others. His Queen's Counsel justified his request for a sizeable basic fee by noting his difficulty in convincing the suspicious defendant to plead guilty and the value to society of such an outcome. But for his persuasive skill, the defendant, the Queen's Counsel contended, would not have pleaded guilty and two costs—that of a long trial and of the harm caused by his compatriots—would have been incurred. Although this Queen's Counsel's justification suggests the alarming possibility of treachery within the defense camp, with the barrister becoming an ally of the prosecution, it is more likely that the Queen's Counsel was exaggerating his role to persuade the determining officer to award the fee he sought. Nonetheless, the case presents a sober reminder that rewarding barristers for shortening the proceedings could induce a barrister to stray from his adversarial role.

The advocate was paid more generously by convincing the defendant to plead guilty on the trial's threshold in *ex-post facto* cases so he could be rewarded for shortening the trial. In effect, he could capture part of the fee he would have received (refreshers) had the trial lasted as long as expected. This incentive also introduced the threat of treachery. While by waiving an evidentiary objection, for example, or by not introducing evidence the advocate could be trusted to be seeking a tactical advantage, this incentive made any unexplained concession suspicious. Did the barrister instead seek to profit by pocketing both a higher basic fee for abbreviating the trial and a second basic fee for the brief he otherwise would have had to return if the case had lasted as long as expected? Despite this risk, there was no evidence of such conduct in the cases in this study where barristers sought

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59. In the United States, lawyers are sometimes prepared to manipulate the defendant in almost any way to convince him to plead guilty. This is wrong if the lawyer's purpose is to maximize his return from a fee-paying client, but understandable, even justifiable, if the purpose is to avoid the much more punitive sanction that accompanies a conviction by trial than by guilty plea in many jurisdictions. In the latter instance, the lawyer aims to protect the defendant from a harsh sentence, not to advance his own interest.

an enhanced basic fee for conceding a point or not introducing evidence.<sup>60</sup>

In addition to tempting a barrister to pressurize a guilty plea from a defendant who wanted to fight and stood a possibility of an acquittal, the enhanced payment for a cracked trial creates a greater possibility of this as it saves costs. Paying a higher basic fee for a cracked trial encourages barristers to delay negotiations both with the defendant over his intent to plead or fight, and with the prosecuting barrister over his willingness to accept a plea to less than the counts charged. Thus, while a guilty plea on the day of trial saves the cost of a trial, each side could have eliminated part of the time taken to prepare if only they had negotiated the matter at an earlier point.<sup>61</sup> Moreover, a cracked trial may idle a judge until another case is assigned to him for resolution, and, when that happens, that defendant may suffer the loss of his barrister who is occupied elsewhere and must return the brief. Thus, the costs of a cracked trial ripple through the process, offsetting the savings from eliminating the need to pay refreshers to the defending barrister.

In *ex-post facto* cases, the defending barrister's economic interests did not incline him to encourage the defendant to decide to plead guilty much before the trial date. This is so because he earned the lowest basic fee in this setting.<sup>62</sup> Yet, if we ignore whether it is in the defendant's interest to plead guilty, convinc-

60. These barristers, however, never explained the advantage of the concession, a point that was unnecessary since determining officers were not permitted to evaluate the wisdom of the advocate's tactical choices. While one must assume that the barristers expected to benefit tactically from shortening the trial, lawyers would probably refuse to concede anything to the prosecution, in hope that it would falter in its proof.

61. Here, too, practical points may better explain negotiations at the last moment. For example, the following could occur: one or both barristers may have been briefed only shortly before the trial's date, a barrister might be unwilling to negotiate until more work is completed by the solicitor, the defending barrister is unable to confer with the defendant until the day of trial, or the defendant sheds his unrealistic expectations only when confronted by the trial.

62. This statement must be hedged with an important condition. The gross payment was the highest when the defendant pleaded guilty on the trial date, and lowest when he agreed to do so at an earlier point. But the effective hourly rate would be a function of the time expended by the barrister in preparing. Because the files in the study involved only cracked trials and trials, there is no way of comparing the effective hourly rates in all three settings. If the barrister took very little time to conclude that the defendant would and should plead guilty, then his effective hourly rate would be quite high because he would not need to prepare for trial, as the barrister would for a trial that eventually cracked.

ing the defendant to plead guilty as soon after the barrister receives the brief is the most economical outcome. Tinkering with the defending barrister's compensation, however, is not the most effective way to limit the number of cracked trials.<sup>63</sup>

It is not clear whether the Lord Chancellor recognized the potential problems created by enhancing the advocate's payment when the trial cracked or was shortened. The latter incentive is not included in the graduated fee scheme. The former is included, although the wide gap that existed in the *ex-post facto* cases in the study between the size of the basic fee for a cracked trial and for a trial has been shrunk markedly. The difference is now a modest four percent.<sup>64</sup> Ironically, barristers might respond by trying cases, all other things being equal,<sup>65</sup> rather than by encouraging the defendant to change his mind and plead

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63. Two better ways involve reducing the sentencing discount as the trial approaches and conducting periodic pretrial hearings to learn the defendant's intent to plead or fight. The same discount of about 30% applies no matter when the defendant announces he will plead guilty. Even if a graduated discount were adopted, however, a defendant could expect a discount of some sort were he to wait until the day of trial. If he got none, then he has no incentive to plead guilty on the day set for trial. A form of pretrial hearing (the Plea and Directions Hearing) now occurs in every case committed to Crown Court for trial. Its purpose in part is to learn whether the defendant will plead guilty. Resolving the case by plea at that stage requires that the defendant's representatives have prepared sufficiently to advise the defendant properly of his choices. As of 1997, the hearing had reduced the rate of cracked trials from 23% to 18%.

64. With Class B offenses (involving "serious violence or damage, and serious drugs offenses"), for example, a Queen's Counsel's basic fee is £1143.50 for a cracked trial and £1091 for a trial. All other advocates receive a basic fee of £326.50 or £311.50.

65. Of course, an advocate's decision to recommend a plea or a trial ought not to be made in view of his expectation of payment, but rather on the evidence, the predicted outcome, and the defendant's desires. Nonetheless, in those cases where the advocate does not have a strong view about that mix of proper factors, he could be swayed to recommend a fight because of the minimal difference in gross between the basic fees for a fight and a cracked trial, and of the certainty of receiving refreshers. Moreover, the barrister might enjoy litigating a case he had thoroughly prepared, to learn whether the story and outcome were as he expected. That said, the effective hourly rate for a cracked trial will be rather higher because, even assuming the same preparation time for a cracked trial and a trial, the basic fee for a trial includes the five hours of the first day. So, for example, assuming the same time to prepare (15 hours), a Queen's Counsel defending a Class A offense would receive an effective hourly rate of £113 if the trial cracked (£1619/15) and £81 for a trial (£1619/20). And further complicating any prediction of the incentives are two other points. The advocate receives a handsome uplift for each day in trial (with Class B offenses, £636.50 for a Queen's Counsel and £182 for other advocates). Yet, the advocate also receives a much higher payment for each page of the Crown's evidence when the trial cracks than when it proceeds (in a Class B offense, for pages 11-250, a Queen's Counsel would receive £2150 in a cracked trial and £1183 in a trial).

guilty on the day of trial.<sup>66</sup> This is especially so for a barrister who has no brief for several days and who would prefer the certainty of receiving refreshers in a case he has prepared to the uncertainty of receiving a returned brief in a case whose issues might not interest him.

### III. ENSURING ADQUATE ADVOCACY

Efficiency is an unworthy goal if its pursuit causes deficient representation. One wants to avoid incentives that deter barristers from preparing thoroughly and advocating effectively. Yet, as with the goal of promoting efficiency, there are ways apart from the compensatory scheme that more directly contribute to the barrister's performance. The most obvious is the barrister's dependence upon solicitors for briefs. The solicitor, acting for the defendant, can replace the barrister for any reason. A barrister who imperiously ignores the defendant's desires or inexcusably botches the advocacy can be fired by the defendant. Moreover, even if not replaced, the barrister, by displeasing the defendant or solicitor, jeopardizes his future relationship with that solicitor and his reputation with other solicitors. Also, a distressed defendant can appeal against conviction based on the barrister's faulty performance. While the likelihood of success on appeal is slight, given the imposing burden the defendant must meet,<sup>67</sup> even an unsuccessful appeal could mar the barrister's reputation. Last, the high fees garnered by Queen's Counsel encourage juniors to strive to provide exemplary representation, in order to impress the judges and others whose opinions count in deciding which juniors will be elevated to the rank of Queen's Counsel.

The *ex-post facto* scheme contained two incentives affecting the barrister's preparation—a determining officer's decision

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66. As remains true under the graduated fee scheme, advocates receive the lowest basic fee for a guilty plea. For Class B offenses, for example, juniors and solicitor-advocates receive a basic fee of £326.50 for a cracked trial, £311.50 for a trial, and £204.50 for a guilty plea. Calculated as an effective hourly rate, however, these payments might look different. Assume the junior's preparation was two hours for a guilty plea (£102), five for a cracked trial (£65), and 10 (five for preparation, five for the trial's first day) for a trial (£31). The incentive to pressurize the defendant to plead guilty very early evaporates by assuming the junior took an additional hour to prepare (£204/3 = £68).

67. See *R. v. Clinton*, 2 All E.R. 998, 1005 (C.A. Crim. Div. 1993) (stating that defendant must show "all the promptings of reason and good sense point[ ] the other way [that is, to another option]").

whether the barrister had performed efficiently, and payment for preparing a returned brief—but none relating to his performance. The absence of incentives linked to performance has an obvious explanation. While the files analyzed the barristers' and solicitors' submissions and contained considerable information about their work, determining officers would also have needed to learn about the tactical decisions made by the professionals. Even if barristers would have agreed to provide that information, determining officers, with no legal training were not sufficiently skilled to evaluate performance.

Barristers ought to be encouraged to prepare as they think necessary. Yet, grading the length of the barrister's preparation, and finding that he ought to have prepared more expeditiously, as occurred under the *ex-post facto* scheme, might have depressed the barrister's interest in preparing thoroughly. Barristers may not have learned of this disincentive, however, because determining officers did not publish their benchmarks or regularly explain why they had slashed the fees requested. Thus, barristers were probably perplexed by the outcome without learning that either greater expedition or less work was the lesson to learn. Or barristers might have prepared as they thought necessary, resigned to the prospect of not being compensated as they thought appropriate.

The graduated fee scheme almost eliminates the link between the time taken to prepare and the barrister's compensation. No longer will a barrister's efficiency be graded in setting the remuneration. Instead, with the basic fee established for each category of offense, barristers internalize the cost of their time: the less they prepare, the higher their effective hourly rate will be. Ironically, then, the new scheme may encourage barristers either to prepare less than they might have under the old scheme or to delegate work to the solicitor or to the junior that they should undertake themselves.

The new scheme, however, does seem to recognize that straitjacketing the fee by categories of offenses might discourage a barrister from preparing an especially difficult defense. Thus, because the case "involves a very unusual or novel point of law or factual issue," the defense demands "preparation substantially in excess of the amount normally done for cases of the same

type,"<sup>68</sup> and the basic fee can be increased. Yet, the increase is minuscule,<sup>69</sup> and applicable only to "a very few genuinely exceptional cases" where more preparation than that implicitly assumed in the basic fees is clearly needed.<sup>70</sup>

The second feature affecting preparation under the *ex-post facto* scheme—paying for preparation even when the brief was returned—should have encouraged preparation. The scourge of the legally-aided defense, especially where the compensation is lower (as it was and remains for less experienced junior barristers), is the frequency in which barristers return the brief, to represent someone else, and leave the bereft defendant with a barrister who may open the brief only hours before the trial is to begin.<sup>71</sup> The returned brief cancels the advantage of the cab-rank rule, relegating the defendant to a barrister who, even if skilled, has scant time to prepare and may take a different view of the appropriate tactics, even of the wisdom of contesting the charges, than did the replaced barrister. Even juniors who are briefed often delay preparing until they are rather sure that they will not need to return the brief.

The defense would no doubt improve if the barrister became involved soon after receiving the brief. He would have time to orchestrate the investigation, react to newly-obtained information, plot the defense, and confer with the instructing solicitor and defendant. He might become sufficiently interested in the case to struggle to avoid returning the brief. The barrister's involvement would be especially salutary in *ex-post facto* cases where, by contrast to standard-fee cases,<sup>72</sup> the risks were higher

68. 1996 Legal Aid Regulations, *supra* note 7, sched. 3, ¶ 17(2).

69. The extra compensation seems to be limited to an hourly rate (£62.50 for Queen's Counsel, £33.50 for a junior) for each extra hour above the norm. The advocate carries the burden of proving that the legal or factual issue was unusual or novel.

70. LORD CHANCELLOR'S DEPARTMENT, GUIDANCE TO DETERMINING OFFICERS ON THE GRADUATED FEE SCHEME FOR ADVOCATES IN THE CROWN COURT AND EXAMPLE FEE CALCULATIONS ¶ 18 (1997).

71. See *supra* note 30.

72. In standard-fee cases juniors typically did not receive (nor seek) payment for preparing a brief they returned; it was assumed that they took or returned briefs to maximize the time they were in court. As a result, many standard-fee briefs might have been insufficiently prepared, as the junior delayed planning the defense until he was sure he would not be engaged elsewhere or that no more tempting brief was available. Offsetting any lack of preparation, however, was the fact that with experience juniors could defend most of these cases without much rumination.



for the defendant, the trial would typically last longer, and the case usually demanded more attention.

This incentive worked to a degree in the cases in this study. Every barrister who returned the brief had undertaken preparation, and was paid for the effort. Yet, whether the defense was improved remains unclear because the barrister was not also required to instruct the replacement about his views. However, while there was no evidence in this study that any replacement benefited from the departing barrister's efforts, it is possible that help came from the solicitor's report of conversations he had had with the first barrister or from an advice on evidence prepared by the first barrister.<sup>73</sup>

The graduated fee scheme virtually eliminates this important incentive to prepare a brief the barrister worries he might need to return. A preparation fee is now paid when the brief is returned only if three imposing conditions are met. The barrister must expend more than eight hours in preparing and then convince a determining officer that the preparation was "reasonably carried out."<sup>74</sup> Last, the trial must last longer than five days or, when the defendant instead pleads guilty, the prosecution's evidence consists of more than 150 pages.<sup>75</sup> These conditions will discourage barristers from preparing until rather certain they will not return the brief, thereby creating the risk that some aspect of the defense will be overlooked or not developed.

On the other hand, despite the unlikelihood of receiving compensation for a returned brief,<sup>76</sup> barristers may not dally in

73. An advice on evidence consists of the barrister's answers to the solicitor's questions about directions.

74. 1996 Legal Aid Regulations, *supra* note 7, sched. 3, ¶ 18(2).

75. Based on my study, the Lord Chancellor might also add a requirement that the replaced barrister must share his work with the replacement. In so doing the representation might improve, if, for example, the first barrister spotted something that had escaped the replacement. This condition carries the cost, however, of requiring an evaluation of the replaced barrister's alleged contribution.

76. The Bar seems to be trying to arrange the apportionment of the basic fee between the barrister who returns the brief and his replacement. In July 1998, the Bar announced that under the graduated fee scheme, barristers in the same chambers should themselves decide upon the fee's division. If the barristers are in different chambers, then they should make an agreement before the brief is returned. The Bar acknowledges that it is not the determining officer's role to resolve a dispute over apportionment between the barristers. "Their duty is to pay the correct fee to Counsel who attended Court. It is no part of their concern that other Counsel may have worked on the case when a graduated fee is payable." *See* General Counsel of the Bar of England and Wales, BAR NEWS, July 1998, at 10 (interpreting paragraph 309 of Bar's Code

preparing at least those briefs where the category of offense guarantees a high basic fee. A barrister will arrange his schedule to avoid the need to return a brief that attracts a high basic fee. This is especially true for juniors who are being led. And if interested in retaining the brief, the barrister has a reason to prepare, to please the solicitor, and thus to attract future business from him. For these reasons the loss of a specific payment for preparation may not compromise advocacy, at least in those cases where the level of compensation parallels that in *ex-post facto* cases.<sup>77</sup>

### CONCLUSION

One would expect the graduated fee scheme to achieve the Lord Chancellor's three goals for creating it: to help to control costs, to accelerate the determination of the appropriate fees to pay advocates, and to reduce the unpredictability of the awards in *ex-post facto* cases. Seemingly ignored, however, was the effect of this scheme on incentives to work efficiently and to prepare thoroughly. Fees are now calculated without regard to the time taken to prepare, or to tactical choices that shortened the trial. Determining officers no longer punish dalliance or reward effi-

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of Conduct). This directive is interesting in several ways. First, in *ex-post facto* cases, determining officers were obligated to decide whether and how much to pay each barrister, the one(s) who returned the brief and the one who tried the case. In the cases in the study, every barrister who represented the defendant was paid a basic fee. Hence, the total cost of barristers' fees was probably higher in *ex-post facto* cases because the barristers did not split one basic fee, but each received one. Hence, there was no disincentive to prepare. Second, it may prove difficult for barristers in different chambers to agree to a division before the brief is returned. The brief's return is often more unexpected than the Bar seems to envision. Yet, if it works, such an arrangement may carry the advantage of encouraging the first barrister to share his preparation with the replacement if he must convince the second of the value of his contribution to the defense.

77. The new scheme, however, does depress the advocate's interest in preparing in one way. Now compensated for each page of evidence the Crown intends to introduce, the barrister will no doubt peruse the materials the Crown announces are part of its case. But the barrister receives no special payment for reading unused material. Unused materials are those the prosecution has collected—statements and physical evidence—but will not use. Might it follow that barristers will not inspect unused material carefully, to learn whether there is anything that might undermine the Crown's evidence or support the defense? More likely, leaders will expect the junior to search the unused materials for gems, and ignore anything that the junior did not think was of potential use.

ciency because the advocate will internalize the cost of the time he takes.

The laudatory monitoring goals of the *ex-post facto* scheme must now be achieved by ways apart from the mechanisms of the payment system. It is possible, of course, that the incentives under the *ex-post facto* scheme worked only marginally because their implementation was often inconsistent, and perhaps not even widely known among barristers. As noted in this Essay, various facets of practice may explain as well, if not better, the request to be led, the cracked trial, and the other points considered. Moreover, other, arguably more powerful factors can be trusted to achieve those two goals of efficiency and thorough preparation. Those include judicial oversight;<sup>78</sup> the advocate's self-interest in maximizing his hourly return and the insistence by the members of the defense team that each performs his role. Another factor is the barrister's interest in pleasing the solicitor (and the defendant), given the solicitor's power to fire the barrister in the particular case or damage his reputation among other solicitors tempted to brief him.

It is unknown whether the problems that might arise by eliminating certain incentives under the *ex-post facto* scheme—trials become longer,<sup>79</sup> fewer cases are adjudicated by plea, juniors ask to be led more frequently, or barristers prepare less and leaders delegate more work to others on the defense team—have contributed to the Lord Chancellor's current intention to implement additional changes (contracting with solicitors, a public defender, lowering fees per category of case, reducing the availability of Queen's Counsel). Whatever the answer, as the Lord Chancellor seemed to ignore the incentives created by the *ex-post facto* system in adopting the graduated fee scheme, so in the White Paper and other documents he fails publicly to include any rigorous discussion of how incentives might be affected. As but one example, with a system of contracting cases with solicitors or barristers, the Lord Chancellor may discover that one of the advantages of the *ex-post facto* scheme—barristers were well prepared—is imperiled as advocates (barristers or so-

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78. This will occur at three stages: during pretrial hearings designed to learn whether the defendant will plead guilty or how to narrow the issues at trial; at trial by comments intended to goad the advocate to act more quickly or effectively; and on appeal when the defendant claims the advocate committed reversible error.

79. Anecdotal evidence suggests the length of trials has not increased.

licitors) internalize all of the costs of preparation,<sup>80</sup> and that the problems endemic in the United States—especially the pressure by the lawyer on the client to plead guilty—grow.

Lawyers will appreciate how much more complicated the *ex-post facto* scheme was than that used in federal prosecutions, wherein defending lawyers are paid an amount per hour, for preparation and for advocacy, with a cap on the overall amount.<sup>81</sup> The *ex-post facto* scheme, as well as, to a lesser degree, the graduated fee scheme, contained features designed, as the federal fee scheme does not, to encourage effective and efficient advocacy, in light both of the much more complicated system of divided representation in Crown Court and of the greater willingness to remunerate barristers handsomely under legal aid. Nonetheless, this study of the two compensatory regimes reveals that problems can arise in representing the defendant so that, even if barristers are able advocates, the representation may not be as thorough and effective as certain observers have contended.<sup>82</sup> Moreover, if the Lord Chancellor's proposals for more change are implemented, the fees in the more serious cases will drop. The chasm that currently exists between the compensation a lawyer would receive in federal court for a four-day robbery trial and that received for the same case by barristers under the graduated fee scheme (and especially the *ex-post facto* one) will narrow.<sup>83</sup> That done, it will be interesting to return in a few years to gauge the effect of these changes on the performance of barristers, their effectiveness and efficiency.

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80. A study observing the effect of changing to a pre-determined fee for all work in magistrates' courts concluded that solicitors were preparing less, and thus might be providing "an inferior product." ALASTAIR GRAY ET AL., AN EMPIRICAL ANALYSIS OF STANDARD FEES IN MAGISTRATES' COURT CRIMINAL CASES 15 (1999).

81. For a comparison of the federal and *ex-post facto* fee schemes, see Tague, *supra* note 1. The set amounts paid by category of case under the graduated fee scheme more closely resembles the approach in federal courts. The difference between the two is that fees are higher in Crown Court.

82. Compare Warren Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973) (being excessively complimentary) with TAGUE, *supra* note 16, and Tague, *supra* note 1 (discussing incentives and identifying problems).

83. Of course, recall that the gap in overall cost of defending an indigent defendant between the two systems may remain wide because the defense cost in Crown Court includes the solicitor's fee as well as the barrister's.